

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CA06-663

May 23, 2007

RICHARD L. FRANCE  
APPELLANT

AN APPEAL FROM BENTON  
COUNTY CIRCUIT COURT  
[DR2005-1055-5]

V.

HON. XOLLIE DUNCAN, JUDGE

LORI A. FRANCE  
APPELLEE

AFFIRMED

In an order filed March 3, 2006, the Benton County Circuit Court granted appellee Lori France an absolute divorce from appellant Richard France and divided the marital property. Appellant appeals from the decree, contending that the circuit court ordered an unequal distribution of the marital property when it valued certain marital assets at the time of purchase rather than at the time of divorce and when it awarded him temporary possession of the marital residence until the residence was sold. We affirm.

Appellee filed for divorce on June 29, 2005. A final hearing was held on January 30, 2006, where the only issue was the division of the marital property. The marital property included a plasma cutter, two welders, a four-wheeler, and a boat and trailer combination;

however, those items were missing at the time of the hearing. Appellee testified that she last saw the items in June or July 2005 and that she later learned that Bob France, appellant's father, had removed the items from the marital residence.

Appellant was incarcerated in October and November 2005. He stated that the items in question were in his shop when he was arrested, but that the items were not in his shop when he was released. He stated, "I kind of sort of have a belief as to who has possession of those, but I could not tell you." Appellant heard someone tell him that Bob removed the items from his property. He denied hiding the items. Appellant stated that he purchased the plasma cutter for \$1600 and could sell it for \$800. He testified that he purchased the Miller welder six years ago for \$2500 and could sell it for \$1000. He stated that he purchased the MIG welder used for \$2500 and could sell it for \$1800. He purchased the four-wheeler new in 2000 for about \$5000 or \$6000 and opined that he could sell it for \$1500. He stated that he purchased the boat and trailer used for \$22,000 and could possibly sell it for \$10,000 to \$12,000.

The record shows that appellant resided in the marital home after the parties separated. However, appellee lived in the home while appellant was incarcerated. She left the residence upon his release. Appellant paid the mortgage in August and September 2005; appellee paid it in October and November 2005. As of the hearing, neither party had paid in December 2005 or January 2006.

From the bench the court ruled that the marital home would be sold and that appellant would be responsible for the mortgage, including the past due mortgage, and maintenance of

the home until it was sold. Regarding the aforementioned missing items, the court assessed values to the property and ordered appellant to pay appellee for her interest in those items. The court noted that appellant had essentially bought those items.

By letter dated February 23, 2006, counsel for appellant informed the court that the missing items had been found and would be returned to the marital residence by March 1, 2006. Appellant requested that the court's findings from the bench be amended to provide for the sale of the items. He also noted his intent to vacate the marital residence and asked that the mortgage obligation either be split between the two parties or be passed to appellee if she wanted to reside there until it was sold. Counsel for appellee replied on February 27, 2006, objecting to a modification of the court's bench order.

The final divorce decree was filed March 3, 2006. The court ordered the parties to sell the marital residence and made appellant responsible for the mortgage and the upkeep of the residence until it was sold. The court further ordered that the personal property listed in a stipulated exhibit, except the previously-missing items, would be sold at a private auction at the parties' residence. As to those previously-missing items, the court ordered:

That [appellant] shall pay the sum of \$800.00 to [appellee] for her one-half ( $\frac{1}{2}$ ) share of the plasma cutter, \$1250.00 for her one-half ( $\frac{1}{2}$ ) share of the miller welder, \$1250.00 for her one-half ( $\frac{1}{2}$ ) share of the MG welder, \$2500.00 for her one-half ( $\frac{1}{2}$ ) share of the 4-wheeler, and \$10,000.00 for her one-half ( $\frac{1}{2}$ ) share of the Maxum boat and trailer. The total of \$15,800.00 shall be paid by [appellant] to [appellee] prior to the division of the proceeds from the sale of the parties' personal property.

Domestic-relations cases are reviewed de novo on the record; however, this court does not reverse findings of fact by the circuit court unless the findings are clearly erroneous.

*Taylor v. Taylor*, — Ark. —, — S.W.3d — (Feb. 15, 2007) (citing *Farrell v. Farrell*, 365 Ark. 465, — S.W.3d — (2006)). This standard applies for the division of property itself. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Id.* In order to demonstrate that the circuit court's ruling was erroneous, the appellant must show that the circuit court abused its discretion by making a decision that was arbitrary or groundless. *Id.*

At the time a divorce decree is entered, all marital property is to be distributed one-half to each party unless the court finds such division to be inequitable. Ark. Code Ann. § 9-12-315 (Repl. 2002); *Miller v. Miller*, 70 Ark. App. 64, 14 S.W.3d 903 (2000). When assessing the value of property, the court should consider the value of the property at the time the divorce decree is entered. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). If the court finds that one party should receive more than one-half of the marital property, the basis for such a decision must be recited in the final divorce decree. Ark. Code Ann. § 9-12-315(a)(1)(B).

Appellant argues that the circuit court erred in valuing the previously missing items at the time of purchase rather than the time of the trial. He contends that this resulted in an unequal distribution of property. In making his argument, he notes that he gave the only testimony regarding the value of the previously missing assets and argues that, despite his testimony, the circuit court arbitrarily valued the items at the purchase price rather than the value of the items at the date of trial.

The circuit court did not err in its valuation of the previously missing assets. As noted by appellant, the court awarded appellee one-half the value of the property when it was purchased. However, the circuit court did not have any evidence regarding the value of the property other than appellant's testimony. The circuit court was well within its power to reject appellant's testimony regarding the current value of the property, particularly in light of evidence that appellant's father had something to do with the disappearance of the items. Once that testimony was rejected, the court had no other basis for valuing the property other than the purchase price of the previously missing items. Without any other evidence regarding the value of the property and without the opportunity (at the time of the hearing) to assess the value of the property, any valuation of the property other than the value at the time of purchase would have been arbitrary. Accordingly, the circuit court did not err in assessing the value of the property at the time of the divorce as the value at the time the property was purchased.

While not noted in his point heading, appellant also objects to not having an opportunity to locate the items and sell them along with the other marital assets. He contends that this ruling was unfair in light of the circuit court allowing appellee the opportunity to locate another missing asset and sell it. However, under the clearly-erroneous standard, the circuit court made no error. The testimony shows that appellant's father likely removed the items. The court could have reasonably concluded that appellant had some control over the items; therefore, he had essentially purchased appellee's interest in those items.

The circuit court made no error with respect to the division of the previously missing

marital assets. We affirm on this point.

Appellant also argues that the circuit court erred in awarding him possession of the marital home and requiring him to make the mortgage payments on the home while ordering that the home be sold and proceeds split between the parties. Again, he contends that this constitutes an inequitable division of marital assets. He argues that cases such as *Lytte v. Lytle*, 266 Ark. 124, 583 S.W.2d 1 (1979), stand for the proposition that in dividing the marital residence, a court may do only one of two things: put one party in exclusive possession or order the property sold and proceeds divided. He contends that a court is without authority to put one party in possession *and* order the property sold and proceeds divided.

A similar division of the marital home occurred in *Hodges v. Hodges*, 27 Ark. App. 250, 770 S.W.2d 164 (1989). There, the lower court ordered the parties to sell the marital home and put appellee in possession of the home until the sale. We affirmed, stating that the award of the home to the appellee did not constitute an inequitable division of the marital assets. We continued:

The trial court has the discretion to award possession of the homestead to either spouse upon terms found equitable and just. *Schaefer v. Schaefer*, 235 Ark. 870, 362 S.W.2d 444 (1962). The award of possession made by the chancellor was a temporary measure pending sale, and we cannot say that the chancellor abused his discretion in finding that such an award was equitable.

*Id.* at 258, 770 S.W.2d at 169.

The circumstances in *Hodges* are similar to the facts here. The court awarded temporary possession of the home to appellant until the home was sold and proceeds divided.

*Hodges* is directly on point.

Further, payment of a mortgage is payment of a marital debt. Arkansas Code Annotated section 9-12-315 does not apply to marital debts; therefore, there is no presumption that an equal division of marital debts must occur. *Ellis v. Ellis*, 75 Ark. App. 173, 57 S.W.3d 220 (2001). The trial judge has authority to consider the allocation of debt in a divorce case. *Box v. Box*, 312 Ark. 550, 851 S.W.2d 437 (1993). At the time of the hearing, appellant had been residing in the marital home; therefore, it is equitable to place him in temporary possession of the property until it is sold. We affirm on this point as well.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.